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Australian  
Competition &  
Consumer  
Commission

## Submission for Enforcement Committee

<b>Meeting date</b>	3 March 2016		
<b>Meeting number</b>	1516/28	<b>Paper number</b>	EC1516/171
<b>Trackit / Dynamics case</b>	52135 / CS1000080	<b>In depth commenced</b>	30 August 2013
<b>Title</b>	For update and decision – Enforcement ACT – Wholesale Draught Beer		
<b>Recommendation</b>	<p>The Committee directs staff to finalise the investigation by:</p> <ul style="list-style-type: none"><li>• advising [REDACTED] that although we intend to take no action at this time, the ACCC considers there is a risk that the conduct has the potential in the future to substantially lessen competition by foreclosing small brewers access to venue customers, including if the prevalence or restrictiveness of the conduct were to increase or if there is growth in consumer demand for craft beer, and</li><li>• advising [REDACTED] that the ACCC will be following industry developments, including their future use of exclusionary contract provisions.</li></ul>		
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	<input checked="" type="checkbox"/> This paper contains confidential and privileged material (shaded)		
<b>Conflict of interest</b>	n/a		
<b>Legal cost to date</b>	n/a		
<b>Previous EC Date/s</b>	11 December 2014 (oral update) 21 August 2014 (oral update) 10 April 2014 19 September 2013		

## 1. Purpose

### 1.1. The project team seek:

- 1.1.1. to update the Committee on the progress of the investigation and our assessment of the conduct, and
- 1.1.2. a direction to discontinue the investigation by:
  - advising [REDACTED] that although we intend to take no action at this time, the ACCC considers there is a risk that conduct has the potential to substantially lessen competition by foreclosing small brewers access to venue customers, including if the prevalence or restrictiveness of the conduct were to increase or if there is growth in consumer demand for craft beer, and
  - advising [REDACTED] that the ACCC will be following industry developments, including their future use of exclusionary contract provisions.

## 2. Previous Committee consideration

- 2.1. 19 September 2013 (paper D13/127864, minutes D13/133068).
  - The Committee directed the investigation be continued and noted the proposed use of section 155 notices subject to the statutory requirements being met.
- 2.2. 10 April 2014 (paper D14/42578, minutes D14/46538).
  - The Committee noted the update and endorsed the continuation of the investigation, noting the extended timeframes (due to work on the carbon tax repeal monitoring project).
- 2.3. 21 August 2014 (Oral update, minutes D14/113774).
  - The Committee was updated on the status of the matter and requested it return in December 2014 with a revised Investigation Plan.
- 2.4. 11 December 2014 (Oral update, minutes D14/196742).
  - The Committee was advised that the investigation had recommenced and that the timelines within the Investigation Plan had been updated.

## 3. Alleged conduct and theory of harm / case theory

### Alleged conduct

- 3.1. Potential contraventions are:
  - Section 47 – Exclusive dealing arrangements that have the purpose, effect, or likely effect of substantially lessening competition.
  - Section 45 – Contracts, arrangements or understandings that have the purpose, effect, or likely effect of substantially lessening competition.
- 3.2. [REDACTED] enter into wholesale draught beer supply contracts with their customers (i.e. pubs, restaurants, sporting venues, entertainment venues, etc, collectively **Venues**<sup>1</sup>) which contain provisions that:

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<sup>1</sup> 'Venues' in this context refers to entities that are customers/potential customers of brewers. As such, a Venue (the customer) may have multiple premises.

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- 3.2.1. require certain proportions of the customers' draught beer taps to be dedicated to the supplier's products (tap tying)
- 3.2.2. require certain product categories of draught beer to be exclusive to the supplier's products (category exclusivity)
- 3.2.3. contain minimum volume commitments
- 3.2.4. provide volume based and/or tap representation based rebates, and/or
- 3.2.5. offer other incentives regarding the provision or funding of venue infrastructure (e.g. beer reticulation systems, taps, pouring equipment, refrigeration and cool rooms).
- 3.3. Further, or in the alternative, [REDACTED] supplied, or offered to supply, draught beer to various customers in Australia and/or gave or allowed, or offered to give or allow, a discount, allowance, rebate or credit to various Venue customers in Australia in relation to the supply or proposed supply of draught beer, on condition that the Venue customers would not, or would not except to a limited extent, acquire draught beer products directly or indirectly from their competitors.
- 3.4. Paragraphs 3.2 and 3.3 above are referred to, in aggregate, as **the conduct**.
- 3.5. It is alleged that the conduct had the purpose and/or effect, or likely effect, of substantially lessening competition in the wholesale draught beer market (or markets) in Australia.
- 3.6. The ACCC received complaints from [REDACTED] expressing their concern that many Venues were not willing to obtain supply of draught beer from them as this would breach their contractual obligations to [REDACTED].

## Theory of harm

- 3.7. The theory of harm involves foreclosure of small brewers' access to their preferred (least cost) distribution channel, being the supply of beer to wholesale customers in kegs rather than bottles or cans (**packaged beer**). Packaged beer is less attractive to small brewers mainly due to the higher ongoing cost of packaging materials (compared to kegs, which are reusable) and higher rate of excise applied to packaged beer following the introduction of the GST in 2000.
- 3.8. The concern is that the conduct may be preventing or hindering small brewers (new entrants and incumbents) from gradually building up their business to realise economies of scale. The conduct may substantially lessen competitive constraint on [REDACTED] by limiting small brewers' successful entry and expansion to situations where they:
  - 3.8.1. enter with a product line that is as extensive and/or as popular as those offered by [REDACTED];
  - 3.8.2. invest in their own venues (ie. enter at two levels in the vertical supply chain), which increases the risk associated with entry/expansion; and/or
  - 3.8.3. offer prices to Venues that are sufficiently low to compensate them for foregone rebates from [REDACTED] (which is likely to render entry/expansion unsustainable in the medium to long term).



## 4. Investigation and assessment

### Summary

- 4.1. Following a targeted investigation the team considers that the weight of evidence from our investigation does not support the postulated theory of harm, as:
- the information provided by the majority of the Venues contacted does not support the allegations made by [REDACTED];
  - consumer demand remains a key factor in Venues' decisions as to what draught beer products to acquire and Venues provided many reasons, unrelated to [REDACTED], for rejecting small brewers' beers;
  - the rebates offered by [REDACTED] do not appear to significantly impact Venues' decisions as to what draught beer to acquire;
  - at the moment, the prevalence and restrictiveness of the relevant contract provisions are such that Venues are able to accommodate acquisitions from small brewers, to the extent that the Venues consider those products meet their patrons' preferences;
  - despite consumer demand for craft beer growing in recent years, based on CCEU estimates we consider it is likely to account for less than 12% of Venues' draught beer sales;
  - a number of small brewers have been successful in expanding their volumes (despite [REDACTED]) through pursuing both draught and packaged beer production and/or through a well-resourced marketing plan to create brand awareness and ultimately demand from Venues.
- 4.2. However, the team also considers that the conduct has the potential in future to substantially lessen competition by foreclosing small brewers access to venue customers, if the prevalence or restrictiveness of the conduct were to increase or if there is growth in consumer demand for craft beer. Therefore we consider it worth cautioning [REDACTED] as part of our finalisation of the investigation.

### Market enquiries

- 4.3. The investigating team worked closely with CCEU throughout this investigation to develop and refine the theory of harm, prepare questions for s. 155 Notices and market enquiries and assess the information received as a result of our inquiries.
- 4.4. The team met with [REDACTED] discuss their concerns about the anti-competitive effect of the conduct (except for [REDACTED] who ceased responding to our contacts). The meeting with [REDACTED] was also attended by CCEU and [REDACTED], who made submissions on behalf of [REDACTED].
- 4.5. The team contacted approximately 140 small brewers identified via industry associations and obtained information from 57, either by way of interviews or written responses, about their business, market observations and experiences in securing supply contracts with Venues.
- 4.6. The team also interviewed [REDACTED], to understand their experience in entering and achieving economies of scale in the Australian beer industry, including by securing supply contracts with Venues.



- 4.7. From each small brewer that responded to our enquiry letter, the team obtained lists of the Venues for which either the small brewer had approached to supply their draught beer products but the Venue declined the offer of supply for any reason, or the Venue acquired the small brewer's draught beer products but subsequently ceased acquisition for any reason. The combined lists identified Venues throughout most of Australia, but the majority were Venues in the following areas:

- 4.7.1. Inner metropolitan Sydney;
- 4.7.2. Inner metropolitan Melbourne;
- 4.7.3. Suburban Sydney;
- 4.7.4. Suburban Melbourne;
- 4.7.5. Newcastle, NSW Central Coast, and other regional NSW areas such as Armidale, Grafton and Bungendore; and
- 4.7.6. the Victorian Surf Coast, and other regional Victoria areas such Bendigo and Ballarat.

The team contacted 137 Venues from across the above areas in the combined lists and in the course of the investigation were able to interview 36 Venues out of those contacted. One Venue interviewed was a complainant who contacted the Infocentre [REDACTED] discussed at paragraphs 4.22 to 4.23 below).

- 4.8. Section 155 Notices were issued to [REDACTED] requesting information and documents that helped to inform the prevalence and restrictiveness of the contractual provisions. [REDACTED] were required to produce large volumes of contracts with Venues. To reduce the burden of responding, a subset of contracts was negotiated: the top ten customers nationwide and in each state or territory and a representative sampling contracts containing one or more of the contract provisions set out in paragraphs 3.2.1 to 3.2.5 above. [REDACTED] were also required to specify the proportion of their contracts containing the provisions set out in paragraphs 3.2.1 to 3.2.5 above. [REDACTED] undertook this analysis for all contracts in effect during 2012/13. [REDACTED] undertook this analysis for all new contracts signed in the June to December 2013 period, [REDACTED]
- 4.9. Most small brewers described themselves as craft brewers. [REDACTED] offer brands they describe, and which are accepted by some Venues and consumers, as craft beer. However, there is no agreed industry definition of craft beer and substantial disagreement in the industry on whether any brand offered by [REDACTED] should be considered craft beer. In this paper, references to 'craft beer' include references to [REDACTED] craft beer products, unless otherwise specified.

## **Market observations**

- 4.10. The team considers that the area of competition impacted by the conduct is/are the market (or markets) for the wholesale supply of draught beer in Australia.
- 4.11. Most venues were strongly of the view that draught and packaged beer are distinct products and not regarded by themselves or their patrons as close substitutes. Most considered that a small increase in the price of draught would be unlikely to result in many consumers switching to packaged beer. Venues' packaged beer acquisitions usually are structured to complement (rather than compete with) their draught beer products/brands.



- 4.12. Small brewers had mixed views; small brewers with higher sales were more likely to consider draught and packaged beer to be closely substitutable. Smaller brewers that considered the products were not closely substitutable emphasised supply side issues with draught beer being more profitable because of lower excise and packaging costs. From the small brewers' perspective, margins earned on draught beer sales are significantly higher than packaged beer. [REDACTED] however, argued that draught and packaged beer should be considered close substitutes.
- 4.13. [REDACTED] supply draught beer to Venue customers throughout Australia. They appear to have some overarching national marketing strategies, but rely on local sales representatives to negotiate contracts with individual wholesale customers. [REDACTED]
- 4.14. Smaller brewers generally supply draught in a relatively small area, reflecting their small scale (in production and distribution) and preference to market themselves to Venues and end consumers as being a 'local' brewer. Some small brewers (for example [REDACTED]) reported hiring equipment and premises closer to final consumers, to reduce transport costs and sell beer in multiple states.

## Assessment of the prevalence and restrictiveness of the conduct

- 4.15. [REDACTED]
- 4.16. [REDACTED] advises that [REDACTED] of its draught beer customers (representing [REDACTED] of draught beer volumes) are contracted under agreements [REDACTED] that contain one or more of the provisions outlined in paragraph 3.2. [REDACTED]
- 4.17. Contract terms are typically 3 years, but alternative terms are often negotiated on a case by case basis. [REDACTED] advises that it has a small number of contracts with a term of 5-10 years. However, the term of many contracts is, in practice, [REDACTED]

<sup>2</sup> As noted in paragraph 4.8 above, [REDACTED] were required to specify the proportion of their contracts containing the provisions set out in paragraphs 3.2.1 to 3.2.5 above. For the purposes of this exercise [REDACTED] excluded its Ranging and Rebate Agreements from its analysis on the basis that [REDACTED]

[REDACTED] appears to distinguish Ranging and Rebate Agreements on the basis that [REDACTED], as opposed to it being a breach of contract. However the team considers that [REDACTED] should have included Ranging and Rebate Agreements in this analysis, [REDACTED]

[REDACTED] The team notes that this likely means that the percentages of [REDACTED] contracts that it has advised contain the contract provisions set out in paragraphs 3.2.1 to 3.2.5 above should be larger, and may explain some of the disparity between [REDACTED] figures and the figures the team has produced from our analysis of [REDACTED] contracts produced under s155(1)(b).



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- 4.18. The team's analysis of the contracts produced by [REDACTED] under section 155(1)(b) focused on Venues in NSW and Victoria, to correspond with the geographic focus of the Venue interviews. The analysis sample is likely to exhibit biases, given the small sample size [REDACTED] [REDACTED] ) and the predominance of [REDACTED] (see paragraph 4.8).

### Tap tying

- 4.19. Most of the venues interviewed in the course of this investigation reported their premises having between 4 and 50 taps. So, for example, [REDACTED]

- 4.20.

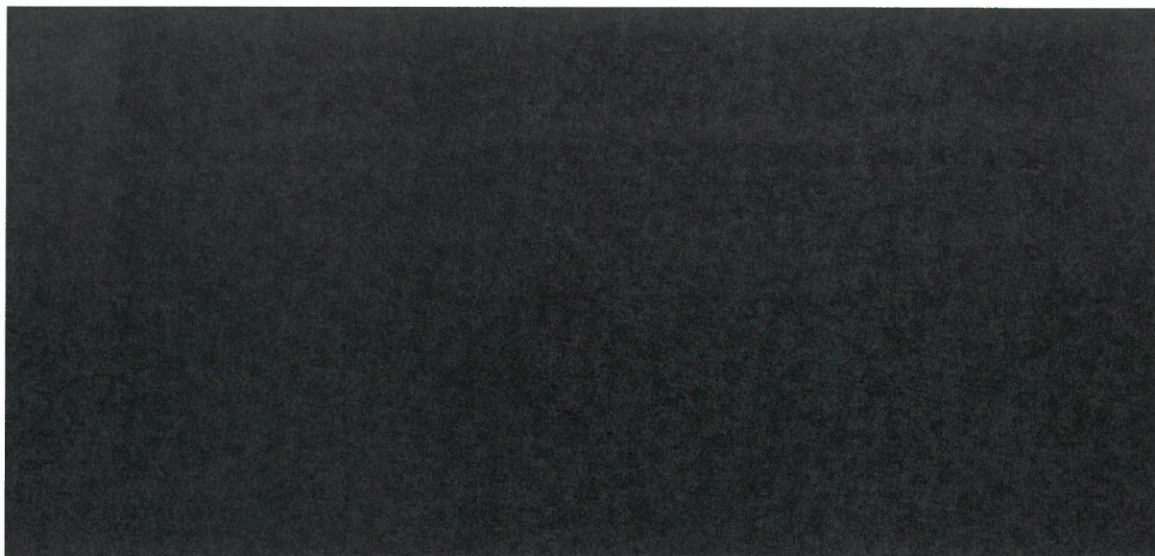
- 4.21. Around [REDACTED] of [REDACTED] customers (representing around [REDACTED] of its draught beer volumes) [REDACTED], many of which contracts contain tap tying requirements ([REDACTED] from [REDACTED] advice; [REDACTED] from the sample of [REDACTED] contracts analysed by the team). However, in the majority of cases [REDACTED] the relevant tap tying requirement leaves [REDACTED] taps available for rival brewers' products (see Chart B below).

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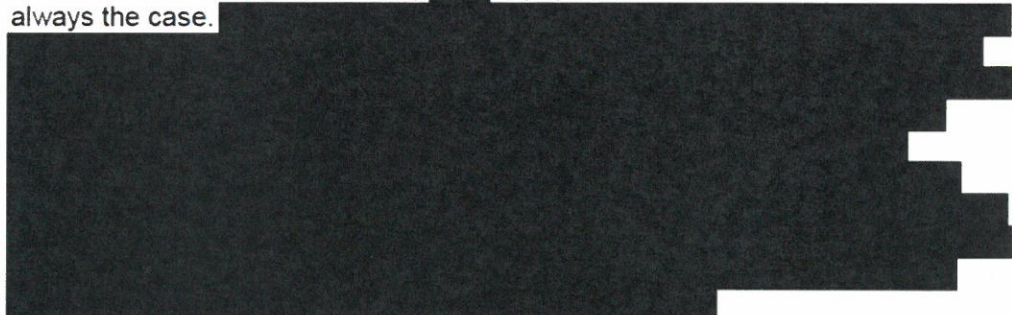
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- 4.22. Most Venues reported being able to accommodate their patrons' demand for craft beer while still complying with any [REDACTED] tap tying provisions. However, this was not always the case.



4.23.



- 4.24. Most Venues reported that they were able to accommodate their patrons' demand for craft beer while still complying with [REDACTED] tap tying provisions. Two Venues reported that their current percentage of taps dedicated to [REDACTED] products is higher than it should be, based on customer demand. However the two Venues had plans to actively deal with this.

4.25.



4.26.



4.27.





[REDACTED]

## **Category exclusivity**

4.28. Category exclusivity provisions typically focus on draught beer products supplied by [REDACTED] [REDACTED] – ie. 'mainstream' categories, such as 'Light' and 'Mid-strength'.<sup>3</sup>

4.29. [REDACTED]

4.30. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

4.31. [REDACTED]

4.32. [REDACTED] advised that [REDACTED] of contracts in place during 2012/13 included some form of category exclusivity. Of the [REDACTED] sample of contracts analysed by the team:

- [REDACTED] had some form of category exclusivity provision,
- [REDACTED] had a light beer category exclusivity provision (the most common category exclusivity provision), and
- [REDACTED] had a craft beer category exclusivity provision.

4.33. [REDACTED] does not appear to have a standard form contract definition of 'craft'.

4.34. Category exclusivity provisions sometimes name specific beers made by [REDACTED] [REDACTED] [REDACTED] that are not to be sold by the Venue in a particular category (e.g. full strength beer). [REDACTED]

4.35. [REDACTED]

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<sup>3</sup> [REDACTED]

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- [REDACTED]
- 4.36. [REDACTED] advised that from its analysis of contracts in place during 2012/13, 21% of contracts included [REDACTED]
- [REDACTED]

- 4.37. None of the 36 Venues interviewed in this investigation reported having [REDACTED] contract or [REDACTED] contract that included a requirement for craft beer category exclusivity.

## ***Rebates and interaction with tap tying and minimum volume commitments***

- 4.38. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

- 4.39. [REDACTED]

- 4.40. [REDACTED]

- 4.41. [REDACTED]

- 4.42. [REDACTED] advised that rebates are used as a means to engage in wholesale price competition. Almost all [REDACTED] contracts include some form of minimum volume commitment.

- 4.43. [REDACTED]



- [REDACTED]
- 4.44. Higher minimum volume commitments and higher tap tying percentages are generally associated with [REDACTED]

- 4.45. Again, this variation was confirmed by the [REDACTED] sample of contracts analysed by the team. All of the [REDACTED] contracts analysed included rebates. The rebates ranged from [REDACTED] [REDACTED] did not provide a wholesale pricelist, however information gathered from various sources throughout the investigation suggests that [REDACTED] wholesale keg prices are within a [REDACTED] [REDACTED] prices. This suggests that the highest [REDACTED] rebate represents a price discount in the order of [REDACTED] depending on the type of beer, with the more expensive beers (including craft beers) at the lower end of this discount range.

- 4.46. The majority of Venues interviewed did not indicate specifically whether (and if so, how) rebates from [REDACTED] influenced their decisions as to what draught beer to put on tap.

- 4.47. An example of a Venue that indicated it was not influenced by [REDACTED] rebates is [REDACTED]

- 4.48. In contrast, [REDACTED]

- 4.49. [REDACTED] it is not clear that Venues consider rebates as anything more than effectively being discounts on wholesale prices. No Venues reported that they were reticent to offer a beer from a small brewer due to fear of losing rebates on their high volume [REDACTED] mainstream beers. As noted above, the majority of Venues interviewed did not indicate one way or the other specifically whether (and if so, how) rebates influenced their decisions as to what draught beer to put on tap. However, the majority of Venues interviewed were strongly of the view that they put on tap the draught beer products they believed their customers wanted.

## ***[REDACTED] direct investment in Venue infrastructure***

- 4.50. [REDACTED]

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- 4.51. [REDACTED]
- 4.52. [REDACTED]
- 4.53. [REDACTED] did not provide specific detail on why or how it implements or negotiates provisions for direct investment in Venues. However [REDACTED] generally stated that the key terms of a contract, including direct investments, are driven by customer requirements and need to be mutually beneficial due to the likelihood that dissatisfied customers will switch to competitors. [REDACTED] advised that any tap tying, category exclusivity obligations, and minimum volume commitments directly impact the volumes of draught beer the Venues is likely to sell, and as such, the provisions are used to ensure [REDACTED] achieves a reasonable return on its investment (being the rebates and/or infrastructure investments)
- 4.54. [REDACTED]
- 4.55. [REDACTED]
- 4.56. Many venues reported that it was important to fund their own infrastructure to maintain flexibility in what products they could put in tap. For example, [REDACTED]
- 4.57. In contrast, [REDACTED]
- [REDACTED] contract enforcement and contract negotiations with Venues
- 4.58. [REDACTED]



- [REDACTED]
- 4.59. [REDACTED]
- 4.60. There is very limited evidence to support [REDACTED] suggestions that Venues face meaningful enforcement action by [REDACTED] in response to the Venues supplying products from small brewers. The one exception to this from the Venues interviewed was [REDACTED] (see paragraphs 4.22 to 4.23 above). The team notes that some Venues reported that they had sold beer from smaller brewers in breach of their contracts with [REDACTED] without experiencing any serious consequences from [REDACTED]
- 4.61. [REDACTED]
- 4.62. However the information provided by the Venues interviewed is that, in practice, these provisions are not an impediment to genuine negotiations. Most Venues considered they were free to renegotiate terms or negotiate with other brewers once their contracts with [REDACTED] expired. The Venues interviewed generally reported that the negotiations with [REDACTED] were genuine negotiations and that they were not pressured to accept terms. For example, [REDACTED]
- 4.63. A small number of Venues indicated that they had recently renegotiated contracts, or intended to in the near future, in order to increase flexibility. None of these Venues reported any specific plans to put on a draught beer from a small brewer. They were either looking for a general ability to meet future changes in consumer tastes and preferences or to rebalance offerings from [REDACTED] None of them indicated any past or anticipated difficulties in negotiating their contracts to reduce acquisitions from [REDACTED]

## The demand for craft beer in Australia

- 4.64. ABS data indicates that each year in Australia since the mid 1970s there has been 1.7 to 2 billion litres of beer available for consumption.<sup>4</sup> Per capita, the volume of beer available has declined from around 190 litres in 1974-75 to 92 litres in 2013-14.<sup>5</sup> The ABS does not report the volume of beer available for consumption that is draught (rather than packaged), nor does it report any separate statistics for craft beer specifically.
- 4.65. Anecdotally, market participants report that the demand for craft beer has grown considerably over the last decade.

<sup>4</sup> ABS Catalogue 4307 0.55.001 Apparent Consumption of Alcohol, Australia, 2013-14

<sup>5</sup> ABS Catalogue 4307 0.55.001 Apparent Consumption of Alcohol, Australia, 2013-14

- 4.66. [REDACTED] estimates that in 2015-16:
- 4.66.1. The Australian beer industry realised around \$2.15 billion in revenue from sales of beer (packaged and draught) via wholesalers (rather than retail outlets or exports).<sup>6</sup>
  - 4.66.2. The industry also realised \$376.7 million in revenue from total sales of craft beer (packaged and draught) through hospitality venues (on-premise sales), retail outlets (off-premise sales) and exports.<sup>7</sup>
  - 4.66.3. Around 40% to 50% of these craft beer sales (\$150 - \$188 million) were direct sales to hospitality venues (on-premise) or indirect sales to such venues via distributors, with the remainder being exports or sales via retail outlets (off premise).<sup>8</sup>
- 4.67. On the information currently available to the ACCC, CCEU estimates that craft beer sales account for around 8% to 12% of Venues' draught beer sales revenue in Australia.
- 4.68. [REDACTED] forecasts that demand for craft beer in Australia is expected to grow 6.4% annually over the period 2016-2021. However, most of this expected growth is increased off-premise demand (ie. demand from liquor retail outlets) and therefore would be packaged craft beer. On-premise demand for craft beer (ie. demand from hospitality venues) is expected to grow at a more modest 1% to 1.5% per annum over the period 2016-2021.
- 4.69. As at November 2015, [REDACTED] estimates that [REDACTED] has a [REDACTED] revenue share of the craft beer segment (draught and bottled) and [REDACTED] has [REDACTED]. The team notes that the previous edition of the report included estimates that [REDACTED] had [REDACTED] and [REDACTED] had [REDACTED], suggesting volatility within the segment.
- 4.70. [REDACTED] craft beers include the [REDACTED] are primarily the [REDACTED]
- 4.71. Other large companies supplying beer positioned as craft beer include:
- [REDACTED], via the [REDACTED] range, which is available in both draught and packaged form.
  - [REDACTED]. Both ranges are generally only available as packaged beer, although the [REDACTED] range is available on tap at [REDACTED].
  - [REDACTED] via its [REDACTED], which is produced only in packaged form.
  - [REDACTED] through its acquisition of the [REDACTED] range and, more recently, the [REDACTED] range. Both ranges are available in both draught and packaged form.
- 4.72. The ACCC has considered whether there are any misleading aspects of the labelling of some of these products (amongst others), as part of a separate project.

<sup>6</sup> [REDACTED] Industry Report C1212, Beer Manufacturing in Australia, December 2015

<sup>7</sup> [REDACTED] Industry Report OD5071, Craft Beer Production in Australia, November 2015. [REDACTED]

<sup>8</sup> [REDACTED] Industry Report OD5071, Craft Beer Production in Australia, November 2015. [REDACTED]



Not all of these large companies appear to sell craft beer in draught form. Following [redacted] acquisition of [redacted] estimates that [redacted] is the [redacted] (bottled and draught) with [redacted] of craft beer sales (both bottled and draught) in Australia. No other brewer is estimated to have more than [redacted] revenue share of craft beer sales (bottled and draught) in Australia, according to [redacted] report.<sup>9</sup>

## What Venues told us

### Factors affecting consumer demand for craft beer

- 4.73. **Brand awareness:** Some small brewers assert that the best way to get their brand known, and so generate consumer demand for their draught beer, is by having it on tap in Venues, with consumers deciding what to drink based on the taps in front of them. These small brewers considered a draught presence in Venues as a prerequisite for building consumer awareness of their brand.
- 4.74. [redacted]
- 4.75. However, other small brewers consider that consumer brand awareness can be built first and used to drive Venue demand for their products. Some of the more successful smaller brewers – [redacted] – have adopted marketing strategies consistent with this view and built brand awareness through multiple channels. This brand awareness has had the flow on effect of increasing Venues' willingness to acquire their draught products because they know that consumer demand for the products exists.
- 4.76. Most Venues interviewed by the team advised some level of reluctance to take a risk on a brand for which consumer demand is unknown or not established to some extent. Most Venues advised that their customers generally seek out brands they are familiar with, so if the Venue was to put an unknown beer on tap, the Venue would have to put in extra effort to try to push sales. This in turn affects Venues' demand for small brewers' beers – see paragraph 4.88 below.
- 4.77. **Sessionability:** Many Venues noted that a lot of craft beers are not 'sessionable', that is, customers cannot drink many servings in a 'session' due to the beers robust flavour and/or relatively high alcohol content. Some Venues advised they need to supply sessionable beers, such as [redacted], so customers will remain at their Venue. Such Venues advised that they receive the most revenue from their high volume draught beers. This ties in to the Brand Awareness factor in paragraphs 4.73 to 4.76 above because such Venues are reluctant to risk the revenue they receive from draught beers that sell well by putting an unknown brand on tap.
- 4.78. **Novelty factor:** Some Venues report that the majority of the type of consumers who drink craft beer are always looking to try something new and are not loyal to any particular brand. This is consistent with the business model used by [redacted] which offers a wide variety of regularly changing craft beers. [redacted]

<sup>9</sup> [redacted] Industry Report OD5071, Craft Beer Production in Australia, November 2015. [redacted]



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[REDACTED] While [REDACTED] sells a large amount of craft beer in total, it does not sell a significant volume for any individual brewer.

4.79. [REDACTED] also offer craft beers on a rotating basis. [REDACTED]

4.80. This is consistent with the information provided by the small brewers. A common report from the small brewers is that many Venues that have taps not covered by the tap tying provisions in their contracts with [REDACTED] rotate a number of small brewers' beer through those spare taps.

4.81. **Price:** Craft beer, [REDACTED] attracts a price premium compared to other beer categories. Some Venues noted their customers were price sensitive and therefore did not purchase craft beer. Venues with wealthier customers, or customers in their 30s or 40s, or Venues that focussed on matching beer with food, reported a higher demand for craft beer.

## *A relevant example*

4.82. [REDACTED] is a Venue that demonstrates the impact of many of the above factors. [REDACTED]

4.83. [REDACTED]

4.84. [REDACTED]

## *Factors affecting Venues' demand for craft beer*

4.85. **Price:** Typically, Venues reported setting retail prices based on the wholesale keg price plus a margin (particular to each Venue) which is generally the same across the range of draught beer they offer. Wholesale keg prices for craft beer are generally higher than non-craft beers, regardless of the size of the brewer.



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- 4.86. Some Venues advised that they have only acquired craft beer when able to negotiate lower wholesale prices. [REDACTED]
- 4.87. [REDACTED] sells craft beers, including from small brewers, at prices comparable to mainstream beers. [REDACTED]
- 4.88. **Marketing:** As noted in paragraph 4.76 above, many Venues reported the need to invest time and/or money in promoting new beers – [REDACTED] order to generate consumer demand. However, in the case of [REDACTED] beers, [REDACTED] essentially take care of this issue as they extensively advertise and also provide Venues with marketing support. Some Venues noted that small brewers tend not to advertise or provide marketing support, which affects sales. They considered it to be the brewers' role, not theirs, to invest in generating brand recognition and consumer demand and therefore if a small brewer with an unknown beer is not doing this, the Venues would be less likely to put their beer on tap. One Venue specifically noted that it only sells craft beer from brewers who invested in marketing.
- 4.89. **Scale:** All of the above factors (poor sessionability, novelty, price, lack of brand awareness and lack of marketing support) contribute to the difficulty many Venues reported in being able to sell a keg of a small brewer's craft beer before the beer goes off.
- 4.90. Venues commonly reported needing to sell a keg per week to maintain freshness of the draught product. A small number of Venues stretched this to two or three weeks. Venues reporting total sales of 10 to 20 kegs per week in particular were concerned about small brewers' draught beer not selling fast enough.
- 4.91. To illustrate the significance of this threshold, analysis of [REDACTED] sales figures indicates that its average wholesale customer purchases [REDACTED]
- 4.92. Standard keg size is 50 litres. Supplying smaller kegs is not common practice in Australia, but is elsewhere (common sizes overseas include 30 and 19 litres). One reason for this may be that kegs smaller than 49.5 litres attract a higher excise rate, eliminating part of the attraction of selling draught, rather than packaged, beer.
- 4.93. **Attribution of conduct** [REDACTED]



- [REDACTED]
- 4.94. The team also notes that a rejection from a Venue on the basis that it has no room for a small brewer's beer (or similar reasoning) could easily be interpreted by a small brewer as: 'the Venue is rejecting my beer because of the contractual restrictions [REDACTED] is applying'. Whereas the real meaning might be that the Venue considers the beers it currently has are selling well and it is not willing to take the risk of putting an unknown beer on tap.

## Successful entry and expansion by many small brewers

- 4.95. Throughout the more recent history of the Australian brewing industry there have been small brewers that have grown and expanded independently before being purchased by [REDACTED] who have used the brand to expand their presence in the craft segment. [REDACTED] was a small brewer that commenced operation in the [REDACTED]. It was ultimately purchased by [REDACTED]. The original brewers behind [REDACTED] was purchased by [REDACTED] ultimately owned by a [REDACTED] whose Australian brands include [REDACTED] also previously acquired another Australian small brewer, [REDACTED]
- 4.96. The only significant craft beers that were developed in-house by [REDACTED] rather than through acquisition, are the [REDACTED] It was acquired by [REDACTED] and it was renamed the [REDACTED]
- 4.97. While most of the 57 small brewers who provided information in this investigation reported low output and difficulty in expanding, this was not the case for all.
- 4.98. [REDACTED] (see the discussion regarding the 'novelty' factor associated with craft beer at paragraphs 4.78 to 4.80 above).
- 4.99. According to a [REDACTED] From intelligence gathered throughout this investigation, we understand that 500,000 litres per year appears to be a significant threshold for a brewery's profitability based on standard sizes of prefabricated brewing equipment. [REDACTED]



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4.100.

4.101.

4.102.

4.103. Whilst many small brewers have entered or expanded to a small degree by investing in their own venue (mostly through brewpubs at which the small brewer largely sells its own beer), none of the more successful small brewers have achieved their high level of production through buying or building a large number of venues in order to move a large volume of beer. Neither have the more successful small brewers entered with a product line as extensive as [REDACTED], instead achieving their success through a couple of key brands.

4.104. However, the most successful small brewers do appear to have certain common features, including a balanced approach to production of draught and packaged beer, and/or a well-resourced marketing plan that focuses on creating brand awareness to generate consumer demand to, in turn, create Venue demand. This contrasts with the view of [REDACTED] that entering via the draught distribution channel is the only way to build the consumer awareness of their brand necessary to increase sales and build business.

4.105. There do not appear to be any small brewers experiencing significant growth through an all-packaged approach, as [REDACTED] did in the past. [REDACTED] is the [REDACTED] [REDACTED] but is much smaller than [REDACTED]. As a [REDACTED] estimate that [REDACTED] (which covers both bottled and draught, and production for [REDACTED])



distribution via all channels). [REDACTED] originated in [REDACTED] and has a core following there, but in recent years it has substantially increased its market share in [REDACTED]

- 4.106. [REDACTED] has been in operation for [REDACTED] experience pre-dated the differentiated excise rates between draught and packaged beer that were introduced following the commencement of the GST in 2000. The team considers that the differentiated excise rates likely affects the ability of a small brewer today to expand significantly based on the production of packaged beer alone, as [REDACTED] did when it started operating.
- 4.107. [REDACTED] has some contracts containing provisions similar to those set out in paragraphs 3.2.1 to 3.2.5 above. However [REDACTED] states that its contracts only include rebates where requested or negotiated by the customer. The team considers this is a response to the 'rebates culture' that exists in the industry.

## Overall assessment

- 4.108. Whilst there is some evidence that the conduct impacts on the decision making of some individual Venues, the weight of evidence from our investigation does not support the postulated theory of harm that the conduct has the *purpose or effect* of substantially lessening competition by foreclosing small brewers' access to the draught beer distribution channel.
- 4.109. Key findings of the investigation to date are:
- 4.109.1. Many small brewers have been able to increase sales, with some increasing sales to efficient production levels. The most successful small brewers have been able to do this through approaches other than those articulated in the theory of harm at paragraph 3.8 as the situations small brewers may be limited to in order to successfully enter/expand. These brewers appear to have certain common features, including a balanced approach to sales of draught and packaged beer, and/or a well-resourced marketing plan that focuses on the small brewer itself first creating brand awareness in order to generate consumer demand.
  - 4.109.2. There is strong competition between Venues to attract patrons. The preferences of patrons are therefore a key factor in Venues' decisions about which draught beer products to put on their taps. Many Venues reported that the beers they had on tap represented what the Venue would have acquired anyway because of consumer demand, regardless of the terms of their contract with [REDACTED]
  - 4.109.3. Consumer demand for craft beer has grown in recent years but craft beer (including craft beers produced by [REDACTED]) is likely to account for less than 12% of Venues' draught beer sales. Future growth in craft beer sales through Venues is expected to be quite modest (1% to 1.5% per annum).
  - 4.109.4. At the moment the conduct appears to 'leave room' (in terms of taps and volume) for rivals, including small brewers, to sell their draught products to most Venues if those Venues consider those products are what their patrons prefer to drink. Many Venues reported being able to meet consumer demand

<sup>12</sup> [REDACTED] Industry Report C1212, Beer Manufacturing in Australia, December 2015. [REDACTED]



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for craft beer from small brewers within the terms of their existing [REDACTED] contracts.

4.109.5. Venues offered a variety of reasons for not acquiring more beer from small brewers or more craft beer generally, other than [REDACTED] conduct. In summary:

- The majority of Venues' patrons prefer to drink brands that they already know. Consequently, Venues are more willing to put a small brewer's beer on tap if the small brewer has invested in marketing and generating brand recognition. Many Venues in fact seek out small brewers' beer where brand awareness amongst consumers already exists. Venues are generally not willing to take a risk on an unknown beer.
- Many craft beers lack sessionability and so are not purchased in high volumes by consumers. Venues receive most of their revenue from their high volume draught beers and so are reluctant to risk the revenue they receive from draught beers that sell well on a lesser known and unsessionable craft beer.
- Many consumers who like to drink craft beer are not loyal to any one small brewer brand and deliberately seek out new, or a variety of, craft beers. This leads to Venues rotating multiple different small brewers' beers through their taps – often a few through a single tap. It also means that such Venues do not purchase a significant volume of any individual brewer's beer.
- Venues generally set retail prices based on the wholesale keg price plus a margin. Given that wholesale keg prices for craft beers are generally higher than for 'mainstream' beers, some Venues reported that their customers were unwilling to pay the higher prices the Venues would need to charge for craft beer to make a profit.
- Venues commonly reported needing to sell around a keg a week of any draught beer product to maintain product freshness. The combination of the above factors (ie. lack of brand awareness, lack of marketing support from a small brewer, poor sessionability, the novelty factor and pricing) means that Venues can struggle to meet this requirement. Therefore many Venues are often unwilling to allocate more than one or two taps to small brewers' craft beer products. Further, Venues are less likely to acquire a small brewer's beer altogether if it is affected by one or more of the above factors, as the beer will go to waste if it does not sell in time.

4.109.6. As noted in paragraphs 4.93 to 4.94, Venues do not necessarily articulate these above reasons to small brewers, leading them to believe or assume that the Venues' contractual obligations to [REDACTED] are the main reason for not acquiring the small brewers' beer.

4.109.7. The team notes, however, that demand for craft beer [REDACTED] appears to be growing, albeit at a slower rate in the on-premise segment (ie. through Venues). Should demand for craft beer in draught form continue to grow, and/or if the pervasiveness and restrictiveness of [REDACTED] contractual provisions increase, the team considers it is possible that the substantial lessening of competition assessment could change.

## *Assessment of purpose*

4.110. In forming a view as to whether the arrangements may have the purpose of substantially lessening competition staff note the following observations;

- issues involving contract enforcement by [REDACTED] rarely arise in response to Venues acquiring draught beer from small brewers;
- the evidence from the Venues is largely that contract negotiations with [REDACTED] are genuine negotiations;
- there are generally some made taps available in the supply contract to allow for the supply of draught beer from suppliers other than the contracted major, and Venues do in fact supply alternative draught beer products through those taps;
- from the information obtained through the course of the investigation it appears that the contracts allow Venues to be responsive to consumer demand; and
- there is no evidence that small brewers were targeted by the exclusivity arrangements of [REDACTED]

4.111. Further, from the information obtained from [REDACTED] staff consider that the wholesale supply arrangements have a primary purpose of;

- [REDACTED]
- [REDACTED]

## **5. Other considerations**

[REDACTED]

[REDACTED]

5.1. [REDACTED]

5.2. [REDACTED]

5.3. [REDACTED]



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5.4.

[REDACTED]

5.5. Information regarding the prevalence of the tap tying, category exclusivity, minimum volume commitment, and rebate contract provisions is set out in detail at paragraphs 4.15 to 4.57 to above. Information regarding how the Venues interviewed have reported that renewal and first rights of refusal clauses work in practice is set out at paragraphs 4.62 to 4.63 above.

5.6.

[REDACTED]

However, as discussed in detail in paragraphs 4.73 to 4.94, and summarised in paragraphs 4.109.5 to 4.109.6 above, there are many reasons for which Venues are rejecting beer brewed by small brewers other than [REDACTED] conduct. Further, as reported by some Venues, the level of tap tying present in their contracts represents what the Venue would have acquired from [REDACTED] anyway because of consumer demand, regardless of the terms of their contract with [REDACTED].

5.7.

The team considers that [REDACTED] [REDACTED] [REDACTED] [REDACTED] is generally consistent with our assessment and recommendation, and with CCEU's views.

[REDACTED] email

5.8.

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

5.9. The evidence gathered by the team in this investigation does not support [REDACTED]

5.10. [REDACTED] is not consistent with the results of the team's market inquiries. Most Venues reported that they acquired the

draught beers that they believed satisfied their patrons' demand. Further, most Venues also reported they were able to negotiate with [REDACTED] to ensure their contracts with [REDACTED] allowed them to cater for small brewers' beers that were locally in demand.

- 5.11. Although [REDACTED] is able to supply its draught beer at wholesale prices below, or competitive with, [REDACTED] wholesale prices, Venues reported that small brewers' wholesale keg prices are generally higher than [REDACTED] wholesale keg prices. The information obtained from [REDACTED] generally confirmed this. As such, the team considers [REDACTED]. The team also notes that wholesale keg price is only one factor for Venues in determining which beer to put on a particular tap.

[REDACTED] frequently raised issues about product quality in reference to industry association awards. However the information from our Venue interviews is that this appears to be of only limited promotional importance. Other factors discussed in paragraphs 4.73 to 4.94 above, such as 'sessionability', can temper the appeal of award winning beers.

- 5.12. It is not obvious that the presence of hundreds of small brewers in Australia will justify the presence of hundreds of small brewer beers on tap in Venues – the underlying consumer demand is predominantly what dictates the beers that will be on tap in Venues. Most Venues reported that their current numbers of craft beer taps are sufficient to satisfy consumer demand. Further, the most craft oriented Venue interviewed by staff offered 20 different beers at any one time and noted that this required continuous promotion of the beers to customers even after seven years of operation. Only a very small number of Venues interviewed felt that their [REDACTED] contract was preventing them from increasing their [REDACTED] offerings, however apart from [REDACTED], none had any particular small brewer's product in mind that they wanted to be able to acquire but couldn't because of their contract with [REDACTED].

- 5.13. [REDACTED] the team notes that it could be argued that the Venues we have interviewed are a biased sample and therefore not representative. However the team considers this is unlikely given that the Venues interviewed were those that the small brewers – [REDACTED] – reported as not acquiring their draught beer or acquiring their draught beer but subsequently ceasing to acquire. Further, amongst the Venues the team interviewed:

- a few Venues (albeit a very small number) freely advised that they did feel restricted by their [REDACTED]
- some Venues were not contracted to either [REDACTED], or had a history of switching between [REDACTED] and, in the process, being able to change the relevant terms of their contracts, and
- a few Venues freely advised that they were selling other brewers' beers in breach of their [REDACTED] contract.



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## Relevant / related projects

[REDACTED]

5.14. [REDACTED]

5.15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## **investigation**

- 5.16. In October 2015, the [REDACTED] concluded its investigation into alleged abuse of dominance by [REDACTED] by accepting a voluntary commitment from [REDACTED] to cease its 'outlet exclusivity practices'. Under these practices, [REDACTED] supplied draught beer solely on an exclusive basis, preventing retail outlets from selling draught beers from competing suppliers.
- 5.17. [REDACTED] is a subsidiary [REDACTED] distributing locally popular brands, such as [REDACTED], and core [REDACTED] products in [REDACTED]. It has an estimated [REDACTED] market share in [REDACTED] packaged and draught beer. The only competitor of significant size is [REDACTED] at approximately [REDACTED]

## **and [REDACTED] proposed acquisition**

- 5.18. On 18 January 2016, the ACCC commenced its review of [REDACTED] proposed acquisition of [REDACTED] on a global basis. The investigation team has been liaising with the relevant MARD team, sharing information on market participants and market observations resulting from our enquiries.

## **6. Options**

### **Option 1 – Discontinue the investigation, but caution [REDACTED] – Recommended**

- 6.1. Given the above assessment of [REDACTED] conduct, the team considers that the investigation should be discontinued. However the team considers that in discontinuing the investigation, we should write to [REDACTED] advising:
- The ACCC considers the conduct has the potential to, and in some cases, does impede and/or influence Venues' decisions on what products to offer, and given this, the conduct has the potential to reduce smaller brewers' access to the draught distribution channel.
  - However the information and evidence gathered from our enquiries does not support the allegations that the conduct has the purpose or effect of substantially lessening competition by foreclosing small brewers' access to the draught beer distribution channel.
  - Nevertheless if circumstances in the industry change, including if consumer demand for craft beer (particularly in draught form) increases or if the prevalence and restrictiveness of the relevant contract provisions increases, it is possible that [REDACTED] conduct could contravene sections 45 or 47 in the future.
  - As such, [REDACTED] should exercise caution with their use of the relevant contract provisions in the future. Ultimately, the ACCC is looking to ensure that Venues are not prevented or deterred from responding to changes in consumer preferences by [REDACTED] conduct.
  - The ACCC will continue to monitor for complaints and if further complaints are received, the ACCC may investigate if there have been any changes in the circumstances referred to above.
- 6.2. The team also intends to engage with [REDACTED], and the small brewers and venues that assisted us in our investigation to advise them of the outcome and explain the results of our enquiries. Further, given the public nature of the investigation the team also considers it would be worth issuing a media release to explain the results of our enquiries and our decision.



## Option 2 – Continue the investigation – Not recommended

- 6.3. If the team were to interview more Venues and/or seek a different or larger sample of [REDACTED] contracts then it is possible that the investigation may uncover more evidence that [REDACTED]' conduct is preventing or deterring Venues from offering small brewers' draught beer products that their patrons wish to buy.

[REDACTED]

- 6.4. If the Committee was minded to continue the investigation, the team could undertake some, or all, of the following steps:
- Obtain and analyse a different, or larger, sample of [REDACTED] contracts containing the provisions set out in paragraphs 3.2.1 to 3.2.5 above. However the team considers that this further information will not be a critical determinative factor to our assessment. The crux of this matter rests on whether Venues are less responsive to consumer demand for small brewers' products because of [REDACTED] conduct. As such, the team does not consider this will be an efficient use of resources and it will therefore also impose an unnecessary burden on [REDACTED]
  - Conduct s155 1(c) examinations of targeted executives within [REDACTED] to test the purpose of the conduct.
  - Obtain information from further Venues. The team has interviewed Venues who voluntarily responded to our requests for interviews from a list of targeted Venues (being Venues that small brewers reported as not acquiring their draught beer or acquiring their draught beer but subsequently ceasing to acquire).
    - We could seek to obtain information from Venues on this targeted list that did not respond to our requests for interviews. The team considers this likely will not be fruitful without the use of section 155 notices. The team also notes that it may be difficult to establish the requisite reason to believe in relation to many Venues without obtaining further background information on them first.
    - We could contact additional random Venues other than those on this targeted list and attempt to obtain information from them. Given our hit rate from contacting the Venues on our targeted list was not high (36 interviews from 137 Venues contacted), we consider that this approach could involve a lot of time and effort for potentially little gain.

In addition, as discussed above, the team considers it unlikely that [REDACTED]

[REDACTED] Therefore the team is not confident that obtaining information from further Venues would result in any significant changes to our assessment.

- 6.5. The team considers that continuing the investigation would not be worthwhile. The main factor behind our assessment is that current consumer demand for craft beer appears to be at a level at which Venues are able to accommodate acquisitions from small brewers despite [REDACTED]' conduct. Given the evidence gathered to date, we do not consider that further investigation is likely to fundamentally alter the competition assessment.

## 7. Recommendation

7.1. The Committee directs the team to finalise the investigation by:

- 7.1.1. advising [REDACTED] that although we intend to take no action at this time, the ACCC considers there is a risk the conduct has the potential in the future to substantially lessen competition by foreclosing small brewers access to venue customers, including if the prevalence or restrictiveness of the conduct were to increase or if there is growth in consumer demand for craft beer, and
- 7.1.2. advising [REDACTED] that the ACCC will be following industry developments, including their future use of exclusionary contract provisions.

## 8. Attachments

- 8.1. [REDACTED]
- 8.2. [REDACTED]



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This page and the subsequent 13 pages have been redacted on the basis that they are exempt from release.